

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIMBERLY ANN JOHNSON,
Plaintiff,

v.

ALBERTSONS, LLC,
Defendant.

Case No. 2:18-cv-01678 RAJ

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

MOTION NOTED: DECEMBER 20, 2019

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I. INTRODUCTION

Plaintiff Kimberly Johnson produces substantial evidence supporting both her claims of sex/gender discrimination and retaliation under 42 U.S.C. § 2000e, Title VII, and RCW 49.60 *et seq.*, sufficient to constitute genuine issues of material fact and to overcome summary judgment. Therefore, Ms. Johnson respectfully requests this Court deny defendant's motion.

II. FACTUAL BACKGROUND

A. Ms. Johnson was employed by Albertsons for nearly 35 years.

Plaintiff Kimberly Johnson (hereafter Ms. Johnson) began her employment with Albertsons as a teenager in the bakery department of an Albertsons store in 1983. Johnson dep., 17:15-23. Between 2010 and 2013, Ms. Johnson supervised approximately 20 grocery stores in Idaho, Utah, and parts of Wyoming. Johnson dep., 43:6-9. Ms. Johnson was the top ranked District Manager in the Intermountain West Division during her tenure. Johnson decl., ¶ 5. In 2013, Ms. Johnson's District was the second highest money maker in the entire Intermountain West Division. Johnson decl., ¶ 6. Ms. Johnson's supervisors conferred the "Great Performer" award on her in 2010 and 2011. Johnson decl., ¶ 7, Ennis dep., Ex. 30. Contrary to the Morris testimony, the Boise stores managed by Ms. Johnson were some of the highest performing stores in the Division and were in the best condition of most of the Division stores. Johnson decl., ¶¶ 8, 9, 10. In 2013, Albertsons offered to transfer Ms. Johnson in 2013 to the Northwest Division in Seattle where she had a home. Johnson decl., ¶ 12. She accepted the transfer.

B. From 2010 to 2017, Ms. Johnson's work performance was satisfactory.

1) Bassler's letter to Ms. Johnson was later rescinded.

Northwest Division President Dennis Bassler demoted a District Manager in 2013, then appointed Ms. Johnson that job. Johnson decl., ¶ 14. Mr. Bassler assigned the demoted employee

1 to work for Ms. Johnson. Johnson decl., ¶ 14. After writing a note about her interactions with
2 staff, Mr. Bassler later met with Ms. Johnson and the demoted employee to tell them that the
3 complaints about Ms. Johnson were unfounded. Johnson decl., ¶ 17. Mr. Bassler evaluated Ms.
4 Johnson's 2013-2014 overall performance as Meets Expectations. See Ennis decl., Ex. D.

5 **2) District 24 had Significant Challenges when Ms. Johnson Assumed Management**
6 **of It in 2013.**

7 District 24 was in relatively poor condition when she assumed management of it in 2013
8 (not 2015). Johnson dep., 116:21-25, 117:1-25, 118:1-11. The District had "lower volume, staffing,
9 low profitability, and condition" opportunities (or problem areas). *Id.* The stores were old and
10 needed repair— "they were older and beat up." *Id.* Some were dirty, had out of stock problems,
11 and top line sales problems. *Id.* Customer satisfaction was also a problem in her newly assigned
12 district. *Id.*

13
14 By 2016, District 24 had improved from the time Ms. Johnson assumed management of it.
15 Johnson decl., ¶¶ 18, 19. The year 2016 was extremely challenging for Albertsons and for District
16 24. Schroeder dep., Ex. 60, p. 1. Even so, District 24 was enjoying some successes. For instance,
17 Safety and Sanitation scores for District 24 were the second best in the Division. Schroeder dep.,
18 Ex. 60, p. 3. District 24's out of stocks (un-shelved product) average for the year was the second
19 lowest in the Area 1 of the Division. Schroeder dep., Ex. 60, p.2.

20
21 **3) Perry complaint was resolved in Ms. Johnson's favor.**

22 Mr. Perry and Ms. Johnson worked together successfully from the time of the merge in
23 2015 until Robert "Rob" Backus arrived in the Division to replace Perry in February 2016. Johnson
24 decl., ¶¶ 20,21. In February 2016, then Area 1 Vice President Joe Perry counseled Ms. Johnson
25 about her interaction with staff. Ennis decl., Ex. E. After the counseling session in February 2016,
26 Mr. Perry and Ms. Johnson did a two-week "ride-along" traveling to most of the stores in District

1 24. After the ride-along, Ms. Johnson met again with Mr. Perry and Vice President of Human
2 Resources Carla Thuney. Both Mr. Perry and Ms. Thuney thanked her for spending time with Mr.
3 Perry and being so cooperative and sharing information about her District. Johnson decl., ¶ 22.
4 Ms. Johnson heard nothing further from Mr. Perry and they worked together successfully until he
5 left in October 2016. Johnson decl., ¶ 23.

6 In July 2017, Area 1 Vice President Kenny Smith characterized Ms. Johnson's overall
7 performance for 2016 as Meets Expectations. Johnson dep., Ex. 5; Johnson decl., ¶ 24.

8
9 **C. Robert Backus Began Systematically Eliminating Women from High-level Management
Positions in the Seattle Division.**

10 In February 2016, Robert Backus became the Senior Vice President of the Seattle Division.
11 Backus decl., ¶ 3. Mr. Backus began systematically eliminating women from the top management
12 ranks in the Seattle Division. Johnson decl., ¶ 25. In the spring of 2017, Mr. Backus recommended
13 the demotion of Lori Gruber from her District Manager position to a lower rated job. Backus dep.,
14 141:1-25, 142:1-25, 143:1,144:1-13. Ms. Gruber confided to Ms. Johnson that she was treated
15 differently than her male peers by Mr. Backus. Johnson dep., 98:2-25, 99:1-25, 100:1-2.

16 Mr. Backus then focused his attention on Jackie Katanik, a District Manager in Eastern
17 Washington. Ms. Katanik told John Ortiz, now General Manager of Operations, that Mr. Backus
18 verbally abused her. Katanik dep., 103:4-18, 104:9-25, 105:1-19. After a spring 2017 meeting, Ms.
19 Katanik tearfully told Ms. Johnson that she was very unhappy about the way she was treated by
20 Mr. Backus; that she felt beat up. Katanik dep., 96:3-21; Johnson decl., ¶ 27. Next, Mr. Backus
21 participated in the firing of Tracie Perry, the Area 2 Vice President, who worked directly under
22 Mr. Backus. Johnson decl., ¶ 29. Although Seattle Division President Schroeder and Mr. Backus
23 claim that Ms. Perry chose to resign, she was fired and had no opportunity to remain in her job.
24 Schroeder dep., Morris dep., 43:21-25; 44:1-11; Ennis dep., 91:24-25, 92:1-23.

25 Mr. Backus also oversaw the demotion of Stephanie Kennedy, a District Manager in
26 Alaska. Backus dep., 137:15-25, 138:1-25, 139:1-14. Ms. Kennedy told Ms. Johnson that Mr.

1 Backus put her in a position that would force her to step down. Ms. Kennedy mentioned that she
2 was being groomed by the former Division President to be a Vice President and that Mr. Backus
3 did not like that. Johnson dep., 100:18-25, 101:1-25, 102:1-3. In a little over a year, Seattle
4 Division management went from five female senior managers to two. Then, in April 2018, Ms.
5 Johnson was fired.

6 **D. Ms. Johnson Reported that Mr. Backus was Engaging in Gender Discrimination against**
7 **Female Managers.**

8 Ms. Johnson was very troubled by Mr. Backus's efforts, to demote, terminate, and treat
9 harshly female managers in the Seattle Division, especially after her conversation with Jackie
10 Katanik in the spring of 2017. Johnson decl., ¶ 30. Ms. Johnson was also troubled about the lack
11 of support she was receiving from Mr. Backus and Mr. Smith and the abusive way Mr. Backus
12 treated her in front of the team that reported to her. Johnson decl., ¶ 31. Store Director Dave
13 Carlson and Produce Operations Specialist Sean Pritchard witnessed Mr. Backus being rude,
14 dismissive, and disrespectful toward Ms. Johnson when they toured stores. Carlson decl., ¶ 12;
15 Pritchard decl., ¶¶ 15-16. Joel Rader, the former Produce Operations Specialist who reported to
16 Ms. Johnson, recalls that Mr. Backus and Mr. Smith treated Ms. Johnson with "absolute contempt."
17 Rader decl., ¶ 12. Mr. Backus and Mr. Smith refused to fill many vital vacancies in Ms. Johnson's
18 District, many of which were assistant store manager positions. Pritchard decl., ¶ 13. Mr. Pritchard
19 notes that he has never witnessed senior leadership deny any male manager the opportunity to fill
20 vacancies. *Id.* Mr. Backus refused to fill the position of Center Store Operations Specialist in Ms.
21 Johnson's District for several months—a "right hand person" for the District Manager. Pritchard
22 decl., ¶¶ 9, 10, 11.

23 Beginning in the spring of 2017, Ms. Johnson began have a series of discussions with
24 Trevor Ennis, Seattle Division Human Resources Director, about the bad treatment of female
25 managers by Seattle Division leadership. Johnson dep., 158:13-24. Other management employees
26 also complained. Dave Carlson contacted Mr. Ennis and Boise Corporate Human Resources Peggy

1 Jones and John Ortiz Vice President of Operations in the spring of 2017. He complained that the
2 Seattle Division leadership team of President Karl Schroeder, Senior Vice President Robert
3 Backus, and Area 1 Vice President Kenneth Smith were so abusive that Mr. Carlson was going to
4 resign his more than 30-year tenure with Albertsons. Carlson decl., ¶¶ 2, 14, 16, 19, 23; Ortiz dep.,
5 31:1-16. Ms. Johnson talked to Mr. Ortiz about Mr. Carlson's threat to resign. Johnson decl., ¶ 33.
6 Mr. Ortiz and Ms. Johnson had several discussions about the demotions, terminations, and harsh
7 treatment female managers were suffering at the hands of Mr. Backus. Johnson decl., ¶ 34.

8 Executive Vice President of Operations, Susan Morris, instructed her immediate
9 subordinate Vice President John Ortiz to "share" Ms. Johnson's concerns with Mr. Schroeder,
10 which he did. Ortiz dep., 60:14-25, 63:7-25, 64:1-12. Mr. Schroeder admonished Mr. Ortiz that he
11 wanted to be told about any complaints directly. Ortiz dep., 67:6-25, 68:1-3.

12 Mr. Schroeder told Mr. Ortiz sometime after July 2017 that he believed Kim Johnson was
13 behind complaints about the Seattle Division leadership team that were being conveyed to Boise
14 Corporate management. Johnson decl., ¶ 37. Mr. Schroeder expressed skepticism when Mr. Ortiz
15 told him that others had also complained. Mr. Schroeder responded, "That damn Kim Johnson."
16 Johnson decl., ¶ 37. Ms. Johnson's conversations with Mr. Ortiz about gender discrimination in
17 the Seattle Division and Mr. Schroeder's concern about these complaints occurred in late May or
18 early June and July 2017. Johnson decl., ¶ 38; Ortiz dep., 61:22-25, 62:1.

19 **E. Mr. Backus Hyper-inflated the Sales Projections for District 24 after Ms. Johnson**
20 **Complained about Gender Discrimination.**

21 **1) Sales projections dictated the percentage of labor for each store is the Districts.**

22 Albertsons sets sales goals for every store in the Seattle Division on a quarterly basis.
23 Johnson decl., ¶ 39. Jeffrey Glazer, the former finance manager, confirmed that sales projections
24 are based on a 20-week average trend of sales for each store. Glazer dep., 35:24-25, 36:1-17. If a
25 store is trending positive by two percent for the past 20 weeks, the sales projection for that store is
26

1 expected to hit a two percent increase for the following quarter. *Id.* Once the basic sales projections
2 are calculated, then other conditions are analyzed such as competition opening or closing, new
3 departments in the store, and merchandizing initiatives. Glazer dep., 35:24-25, 36:1-17, 37:9-12,
4 40:18-25, 41:1-3. The sales projections form the basis for the labor percentage forecasted for each
5 store. Glazer dep., 70:15-21; Johnson decl., ¶ 40. The labor percentage dictates the amount
6 available to pay store employees. If a district did not achieve the sales projections set by
7 management, the district has less money to pay employees. Johnson decl., ¶ 41.

8
9 Quarter 2 began in July 2017, right after Mr. Ortiz conveyed Ms. Johnson's complaints
10 about gender discrimination. Johnson decl., ¶ 42; Ortiz dep., 61:22-25, 62:1. Mr. Backus retaliated
11 against Ms. Johnson by telling Finance Manager Jeffrey Glazer to "push" the sales projections for
12 District 24 "higher than any other district in the Seattle Division." Glazer decl., ¶ 12.

13 Mr. Glazer testified that Mr. Backus and Mr. Smith treated Ms. Johnson differently than all
14 the other District Managers. Glazer decl., ¶ 14. The hyper-inflated projections for District 24
15 adversely affected the funds available for labor. Glazer decl., ¶ 15; Ortiz dep., 83:18-24.
16 Insufficient labor resulted in not enough employees to continuously stock shelves, to provide
17 timely customer service, to keep up with maintenance, and to assist in the overall performance of
18 the stores. Glazer decl., ¶ 15. Imposing these unjustified higher projections (or sales targets) on
19 District 24 made it virtually impossible for District 24 to compete successfully with other Districts
20 in the Division. Glazer decl., ¶¶ 16,17; Ortiz dep., 82:13-23 ("... when you get a tough sales
21 projection, it makes it tougher to do your job"). Because of the inflated projections imposed by Mr.
22 Backus and Ms. Smith, District 24 always appeared to be under performing when compared to the
23 target/projections. Glazer decl., ¶ 18. Mr. Smith admitted to Mr. Glazer that the projections for Ms.
24 Johnson's District, but when the next quarter came around, Mr. Smith and Mr. Backus again
25
26

1 imposed unrealistically projections higher than the other Districts in the Division. Glazer decl., ¶
2 19; Pritchard decl., ¶ 12.

3 **2) The inflated projections adversely affected the performance of District 24 in 2017.**

4 By the fall of 2017, when District 24 was struggling with the unfilled vacancies caused by
5 the overly inflated sales projections that cut into staffing the stores, Ms. Johnson's ranking in many
6 respects predictably was low. Johnson decl., ¶¶ 43,44. In October 2017, Ms. Johnson met with a
7 very angry Karl Schroeder. Johnson decl., ¶ 46. Mr. Schroeder stood over her and yelled at her
8 claiming she was "working against" Mr. Backus and Mr. Smith and repeatedly encouraged her to
9 quit. Johnson decl., ¶ 47. Mr. Schroeder demanded she go immediately to Human Resources and
10 get on a performance improvement plan (PIP). Johnson decl., ¶ 48. Albertsons claims that one of
11 the reasons Ms. Johnson was placed on a PIP was because of high turnover. The high turnover was
12 caused by harsh treatment from Seattle Division leadership and the intentional underfunding of
13 labor that resulted in salaried employees having to work much longer hours to make up for
14 insufficient labor. Johnson decl., ¶ 50; Itaoka decl., ¶ 19.

15
16
17 When Ms. Johnson was put on a PIP, the paperwork requirements for District 24 employees
18 increased exponentially. Rader decl., ¶ 9; Pritchard decl., ¶ 17. Instead of blaming any of her staff,
19 Ms. Johnson interceded on their behalf to protect them from the chaos and tyranny caused by Mr.
20 Backus and Mr. Smith. Rader decl., ¶ 14.

21 **3) Store Director Staci Marshall wanted an Assistant Store Director.**

22 Ms. Marshall did not consider quitting or a demotion because of Ms. Johnson. Ms. Marshall
23 had health problems and considered stepping down or transferring to a less stressful store because
24 of those reasons. Marshall dep., 44:4-7, 74:16-25, 75:1-5, 79:8-20 ("I never once said, you know,
25 I want to transfer out of Kim's district. I wasn't happy, but I never said I wanted to transfer.") Ms.
26

1 Marshall was not happy because she did not have an assistant store manager. Marshall dep., 31:15-
2 25, 32:1-2, 36:2-10. Mr. Backus blocked Ms. Johnson's efforts to fill the assistant manager position
3 in Ms. Marshall's store and in several other stores. Pritchard decl., ¶ 13.

4 **4) The deli closure at store 3298 was a one-time event that Ms. Johnson immediately**
5 **remedied.**

6 On a day in December 2017, store 3298 had a deli in very bad condition. Johnson dep.,
7 205:18-25, 206:1-4. The management team all agreed to take the deli out of service until it was
8 cleaned and organized and ready for customer service. Johnson dep., 206:7-21. Contrary to
9 Albertsons' claims, no other District 24 deli was taken out of service at any time during Ms.
10 Johnson's tenure. Johnson decl., ¶ 52. Ms. Johnson immediately worked with the Store Director to
11 ensure that the deli condition improve dramatically, which it did. Johnson decl., ¶ 53; Smith dep.,
12 Ex. 55 (2/2/18 Ecolab Audit – "the deli has huge improvements . . ."). Deli condition was an issue
13 all district managers and store directors struggled with continuously. Johnson decl., ¶ 54.
14

15 **F. Albertsons Advertised for a Replacement Months Before Ms. Johnson was Fired.**

16 When she went on medical leave in December 2017, Albertsons uncharacteristically
17 notified store directors and operations specialists that she was out. Pritchard decl., ¶ 18. In
18 anticipation of her termination, Albertsons advertised for a replacement for Ms. Johnson when she
19 was out on medical leave. Johnson decl., ¶ 59, Ex. D.
20

21 **G. Albertsons Fired Ms. Johnson Despite Significant Improvements in District 24.**

22 The sales projections for District 24 prepared by Mr. Backus for Quarter 4 of 2017
23 (December 2017 through February 2018) while Ms. Johnson was on medical leave, were much
24 more realistic than the previous two quarters. Johnson decl., ¶ 55. By January 2018, Mr. Smith
25 characterized Ms. Johnson's PIP progress as "Made Some Progress." Johnson decl., ¶ 56, Ex. B.
26 District 24's customer services scores had improved significantly by January 2018. Smith dep.,

1 Ex. 40, 41, and 42. District 24's food safety and sanitation scores had improved—food safety at
2 83% and Sanitation at 100%. Smith dep., Ex. 48.

3 Division results were on April 4, 2018—the day before Ms. Johnson was fired. Johnson
4 decl., ¶ 57. Despite the challenges in District 24 due to the inflated projections, by April 4, 2018,
5 Ms. Johnson's District 24 made significant progress. For instance, the Customer satisfaction was
6 calculated in percentage—Ms. Johnson's District was at 89.1%; the goal was 90%. Smith dep.,
7 Ex. 49; Johnson decl., ¶ 58, Ex. C. District 24's rankings were near the middle or better in the
8 Division on most categories. Pritchard decl., ¶ 19. Clearly, Ms. Johnson's performance was
9 improving despite Mr. Backus's efforts.
10

11 **H. Ms. Johnson's Male Replacement was Treated More Favorably.**

12 On April 5, 2018, Mr. Backus announced that Ms. Johnson was being replaced by Brett
13 Podnar. Backus dep., Ex. 4. Mr. Backus further announced that stores were realigned between
14 District 23 and District 24. Five new stores were added to District 24, four of which are high-
15 performing, high volume stores. Pritchard decl., ¶ 20. Three low performing stores in District 24
16 were closed within weeks of Ms. Johnson's termination. Pritchard decl., ¶ 20. District 24 appeared
17 much more profitable after Ms. Johnson's termination because of these changes to the District. *Id.*
18

19 Immediately after Ms. Johnson was fired, Store Director Carlson toured the store he
20 managed with Mr. Backus, Mr. Smith and Ms. Johnson's replacement, Brett Podnar. Mr. Backus
21 and Mr. Smith exuberantly told Mr. Carlson that the store rated 8 or 9 out of possible score of 10.
22 They told him everything looked great. Carlson decl., ¶ 26. Just days before she was fired, Ms.
23 Johnson and Mr. Carlson toured the same store in the very same condition. Virtually, nothing had
24 changed. Yet, when Mr. Backus and Mr. Smith toured the store with Ms. Johnson, they rated the
25 store at no more than 3. Carlson decl., ¶ 27. Mr. Rader was surprised by Mr. Backus and Mr. Smith
26

1 telling him that the bakeries in several stores were “looking good” shortly after Ms. Johnson’s
2 termination. Hardly anything changed since Ms. Johnson’s termination. When she was still
3 employed, Mr. Backus and Mr. Smith claimed the stores were “failed visits.” Rader decl., ¶ 18.

4 III. ARGUMENT OF COUNSEL

5 A. Summary Judgment Standard.

6 At summary judgment, Courts must view all facts in the light most favorable to the non-
7 moving party in determining whether a genuine issue of material fact exists. *Lindsey v. SLT Los*
8 *Angeles, LLC*, 447 F.3d 1138, 1144 (9th Cir. 2005) citing *Bagdadi v. Nazar*, 84 F.3d 1194, 1197
9 (9th Cir. 1996). An issue of fact is genuine “if the evidence is such that a reasonable jury could
10 return a verdict for the nonmoving party. *Lindsey*, 447 F.3d at 1144 (quoting *Anderson v. Liberty*
11 *Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

13 The Ninth Circuit Court of Appeals “has set a high standard for the granting of summary
14 judgment in employment discrimination cases.” *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406,
15 1410 (9th Cir. 1996). “We require very little evidence to survive summary judgment in a
16 discrimination case, ‘because the ultimate question is one that can only be resolved through a
17 ‘searching inquiry’--one that is most appropriately conducted by the factfinder, upon a full record.”
18 *Lindsey*, 447 F.3d at 1144 (reversed summary judgment dismissal where Court concluded
19 intentional discrimination with complex factual questions best addressed by juries) (quoting *Lam*
20 *v. University of Hawai’i*, 40 F.3d 1551, 1564 (9th Cir. 1994)).

22 Here, Plaintiff Johnson produces substantial evidence that from the time Albertsons bought
23 Safeway in late 2015, female management employees, including Ms. Johnson, were targeted for
24 demotion or termination by Rob Backus. Johnson dep., 98:2-25, 99:1-25, 100:1-2, 100:18-25,
25 101:1-25; Katanik dep., 96:3-21, 103:4-18, 104:9-25, 105:1-19; Morris dep., 43:21-25, 44:1-11;
26

1 Ennis dep., 91:24-25, 92:1-23; Backus dep., 137:15-25, 138:1-25, 139:1-14, 142:1-6; Johnson
2 decl., ¶¶ 28, 29. The evidence demonstrates that while Mr. Backus was denying Ms. Johnson
3 support he provided to male District Managers. Once she complained about gender discrimination
4 Mr. Backus began aggressively setting the stage to terminate her employment. Pritchard decl., ¶¶
5 9, 10, 11, 13; Glazer decl., ¶¶ 12-19. Plaintiff satisfies either the “direct or circumstantial” model
6 or the *McDonnell Douglas* model for summary judgment.

7 **B. Plaintiff Rejects the *McDonnell Douglas* Shifting Burden Model at Summary Judgment.**

8
9 The Ninth Circuit Court of Appeals has ruled that regardless upon which type of evidence
10 they rely, Plaintiff has a choice of whether to utilize the *McDonnell Douglas* shifting burden
11 framework or the “direct and circumstantial” (also known as “mixed motive”) framework.
12 See *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) (“[W]hen responding to
13 a summary judgment motion, the plaintiff is presented with a choice regarding how to establish his
14 or her case. [Plaintiff] may proceed by using the *McDonnell Douglas* framework, or alternatively,
15 may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason
16 more likely than not motivated [the employer]”); *Dominguez-Curry v. Nevada Transp. Dept.* 424
17 F.3d 1027, 1039 (9th Cir. 2005) (“a plaintiff may produce direct or circumstantial evidence
18 demonstrating that a discriminatory reason more likely than not motivated the defendant's
19 decision, or alternatively may establish a *prima facie* case under the burden-shifting framework set
20 forth in *McDonnell Douglas Corp. v. Green*”) (emphasis original); *Pacific Shores Properties v.*
21 *City of Newport Beach*, 730 F. 3d 1142, 1158 (9th Cir. 2013) (“A plaintiff does not, however, have
22 to rely on the *McDonnell Douglas* approach to create a triable issue of fact regarding discriminatory
23 intent in a disparate treatment case. Instead, she may ‘simply produce direct or circumstantial
24 evidence demonstrating that a discriminatory reason more likely than not motivated’ the defendant
25
26

1 and that the defendant's actions adversely affected the plaintiff in some way"). Proof of pretext is
2 not required in the mixed motive model. *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1067
3 (9th Cir. 2003) ("In mixed motive cases, . . . it does not make sense to ask if the employer's stated
4 reason for terminating an employee is a pretext for retaliation, when the employer has offered more
5 than one reason for the action that it took. Rather, the relevant inquiry in a 'mixed motive' case is
6 distinct from that of a 'single motive' or pretext case"). Although Plaintiff survives summary
7 judgment under either model, Plaintiff rejects the application of the *McDonnell Douglas* shifting
8 burden model.
9

10 Under Washington law, Ms. Johnson is obligated to produce evidence at summary
11 judgment that a substantial factor motivating the employer was discrimination. *Mackay v. Acorn*
12 *Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311-12, 898 P.2d 284 (1995), a much less onerous
13 obligation than the determining factor requirement under federal law. "An employee may satisfy
14 the pretext prong by offering sufficient evidence to create a genuine issue of material fact *either*
15 (1) that the defendant's reason is pretextual *or* (2) that although the employer's stated reason is
16 legitimate, discrimination nevertheless was a substantial factor motivating the employer."
17 *Scrivener v. Clark College*, 181 Wn.2d 439, 446-47, 334 P.3d 541 (2014) (emphasis added).
18

19 Ms. Johnson produces circumstantial evidence to demonstrate gender discrimination
20 motivated Albertsons' disparate treatment against her in violation of 42 U.S.C. § 2000e, Title VII.
21 The circumstantial evidence she presents consists of Mr. Backus's swift termination and demotion
22 of female management personnel within the first year or so of his appointment as Senior Vice
23 President of the Seattle Division. Johnson dep., 98:2-25, 99:1-25, 100:1-2, 100:18-25, 101:1-25,
24 102:1-3; Katanik dep., 96:3-21, 103:4-18, 104:9-25, 105:1-19; Morris dep., 43:21-25, 44:1-11;
25
26

1 Ennis dep., 91:24-25, 92:1-23; Backus dep., 137:15-25, 138:1-25, 139:1-14, 142:1-6; Johnson
2 decl., ¶¶ 25, 26, 27, 28, 29.

3 In addition, Ms. Johnson produces evidence that Mr. Backus failed to support her district
4 when she asked to be able to fill vacancies that were vital to the successful operation of the stores
5 she managed. Pritchard decl., ¶¶ 8, 9, 10, 11, 13, 14. Mr. Pritchard witnessed male district
6 managers ask senior management to fill vacancies and has never heard any male manager being
7 denied. Pritchard decl., ¶ 14.

8
9 Mr. Backus and other senior managers treated Ms. Johnson rudely, dismissively, and with
10 contempt in front of her management team undermining her authority to do her job. Pritchard
11 decl., ¶¶ 15, 16; Carlson decl., ¶¶ 11, 12, 13; Rader ¶ 12. Senior management's hostile conduct
12 toward Ms. Johnson in meetings and store tours was so obvious and distressing that it was the topic
13 of conversation among her management team when the visits were over. Carlson decl., ¶ 13;
14 Pritchard decl., ¶ 16; Rader decl., ¶ 12. In contrast, Mr. Backus and Mr. Smith were very
15 deferential to male employees in management roles. Carlson decl., ¶ 29. Significantly, shortly
16 before Ms. Johnson's termination from employment one of her stores was rated by management as
17 very poor. Yet, after the store was transferred to Brett Podnar, the same store in the same condition
18 was rated very highly by the same managers. Carlson decl., ¶ 26-27; Rader decl., ¶ 18.

19 **C. Plaintiff Also Satisfies the *McDonnell Douglas* Model.**

20
21 The shifting burden framework for deciding discrimination cases at summary judgment is
22 derived from *McDonnell Douglas v. Green, supra*. It provides a *guideline* and "was never intended
23 to be rigid, mechanized, or ritualistic." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577
24 (1978). The shifting burdens framework was developed to assist Plaintiff in surviving summary
25 judgment in recognition that discriminatory intent is often difficult to prove. *McDonnell Douglas*
26

1 *Corp. v. Green*, 411 U.S. at 802-03. The Supreme Court has made clear that the burden on plaintiff
2 in establishing a *prima facie* case is “not onerous” and requires only that the plaintiff establish facts
3 adequate to permit an inference of discrimination. *Burdine*, 450 U.S. at 253-54; *Patterson v.*
4 *McLean Credit Union*, 491 U.S. 164, 186 (1989).

5 No particular *type of evidence* or *type of proof* is required to establish a violation of state or
6 federal anti-discrimination statutes. Nor is it significant how that evidence is designated - as part
7 of the *prima facie* case or pretext. “The ultimate question for the court in making a summary
8 judgment determination . . . is not whether the plaintiff has produced sufficient evidence to survive
9 the *McDonnell Douglas/Burdine* shifting burdens, but rather whether there are any genuine issues
10 of material fact concerning the defendant’s motivation for its adverse employment decision, and,
11 if none are present, whether the law . . . supports a judgment in favor of the moving party on the
12 basis of the undisputed facts.” *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402 (6th Cir.
13 2008). The inflexible application of the *McDonnell Douglas* shifting burdens creates a barrier to
14 the vindication of civil rights.
15

16
17 **1) Ms. Johnson was performing her job satisfactorily until the Seattle Division
18 leadership’s intentionally hyper-inflated District 24 sales projections.**

19 To show satisfactory job performance, an employee “need not show perfect performance
20 or even average performance to satisfy this element. He need only show that his performance was
21 of sufficient quality to merit continued employment, thereby raising an inference that some other
22 factor was involved in the decision to discharge him.” *Flowers v. Crouch-Walker Corp.*, 552 F.2d
23 1277, 1283 (7th Cir. 1977). *See also Gregory v. Daly*, 243 F. 3d 687, 696 (2nd Cir. 2001) (same).

24 Joe Perry rated Ms. Johnson’s overall job performance as Meets Expectations in July 2016.
25 Johnson dep., Ex. 3. Then a year later in 2017, Kenny Smith again rated Ms. Johnson’s overall job
26 performance as “Meets” Expectations. Smith dep., Ex. 35; Johnson decl., ¶ 24, Ex. A; see also,
Schroeder dep., Ex. 60 (District 24’s out of stocks and food safety were in the top ranks of the

1 Division). The earlier complaints from Mr. Perry and Mr. Bassler were resolved satisfactorily in
2 Ms. Johnson's favor. Johnson decl., ¶¶ 14,15,16,17,21,22,23. Both Mr. Bassler and Mr. Perry
3 rated Ms. Johnson's job performance as Consistently Meets Expectations after they raised issues
4 pertaining to her interactions with employees. Ennis decl., Ex. D; Johnson dep., Ex. 3. The Morris
5 complaints are not true as evidenced by the glowing performance review conducted by Ms.
6 Johnson's immediate supervisor during that timeframe. Ennis dep., Ex. 30.

7 Albertsons makes much of Ms. Johnson acknowledging that 2016 was the worst year of
8 her career. But they fail to mention that 2016 was the worst year for Albertsons after acquiring
9 Safeway. Schroeder dep., Ex. 60, Smith dep. Ex. 35 ("2016 was a very challenging year for
10 Seattle Division with several headwinds beyond the control of district managers.")

11 In 2017, Ms. Johnson's performance was adversely affected by Mr. Backus and Mr. Smith
12 intentionally hyper-inflating District 24 projections making Ms. Johnson's efforts appearing
13 unsuccessful and causing significant labor shortages making it impossible to adequately staff the
14 stores she managed. Glazer decl., ¶¶ 13-19; Glazer dep., 72:15-18; Johnson decl., ¶
15 39,40,41,42,43,44; Itaoka decl., ¶¶ 14-19; Itaoka dep., 129:5-8.

16 Mr. Schroeder's characterizations of District 24 as filthy dirty and the worst he's seen in
17 42 years are self-serving and unsupported by the evidence. In deciding summary judgment, the
18 court "must disregard all evidence favorable to the moving party that the jury is not required to
19 believe." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 151 (2000). The evidence
20 from a nonmoving party can be considered only when "that evidence comes from disinterested
21 witnesses." *Id.* A jury would not be required to believe this testimony, and Mr. Schroeder is not a
22 disinterested witness.
23

24 Despite the challenges Mr. Backus threw at Ms. Johnson, her management team
25 appreciated her efforts. Mr. Carlson worked under Ms. Johnson's supervision for years; the most
26 recent time was 2013 through 2018. He found her to be thorough, fair, objective and supportive.

1 They worked together collaboratively. Carlson decl., ¶ 10. Mr. Rader, the Bakery Operations
2 Specialist who reported to Ms. Johnson states that over his 20 year plus years working for the
3 company, Ms. Johnson was the most effective supervisor he had. Rader decl., ¶ 4. Mr. Rader
4 learned more from her in the first few months than he had in the previous 15 years. Ms. Johnson
5 mentored Mr. Rader until her termination in April 2018. Rader decl., ¶¶ 4, 15. Mr. Rader was
6 amazed at how calmly Ms. Johnson dealt with the horrible environment, constant criticism, and
7 excessive work demands caused by Mr. Backus and Mr. Smith. Rader decl., ¶ 16.

8
9 By April 2018, District 24 was turning around. The sales projections given to the District
10 by Mr. Backus and Mr. Smith were more realistic than they had been since July 2017. Smith dep.,
11 Ex. 49; Johnson decl., ¶¶ 57, 58 and Ex. C; Pritchard decl., ¶ 19. Once the hyper-inflated
12 projections were made more realistic in January 2018, District 24 began making steady
13 improvement. District 24's overall customer experience was above the Division average and fifth
14 out of eleven districts. Ms. Johnson's District was at 89.1% for customer satisfaction; the goal was
15 90%. Smith dep., Ex. 49; Johnson decl., ¶ 58, Ex. C. Speed of checkout in District 24 was three
16 from top out of eleven. *Id.* By March 2018, the Food Safety score for District 24 was 83%--still
17 a challenge, but improving. Three districts' scores were below District 24. Smith dep., Ex. 48.
18 District 24's sanitation score was 100%--at the top of the Division. *Id.*

19
20 **2) Female managers, including Ms. Johnson, were treated differently than the ten**
21 **male District Managers in the Seattle Division.**

22 A plaintiff may show "an inference of discrimination in whatever manner is appropriate in
23 the particular circumstances." *Hawn v. Executive Jet Management, Inc.*, 615 F.3d 1151, (9th Cir.
24 2010) citing *Diaz v. Am. Tel. & Tel.*, 752 F.2d 1356, 1361 (9th Cir. 1985). A "plaintiff may do so
25 through comparison to similarly situated individuals, or any other circumstances" surrounding the
26 adverse employment action [that] give rise to an inference of discrimination." *Hawn*, 615 F. 3d at

1 1156 (quoting *Peterson v. Hewlett Packard*, 358 F.3d 599, 603 (9th Cir. 2004)). Moreover, whether
2 the other employees are similarly situated is a question of fact. *Hawn*, 615 F.3d at 1158 (citing
3 *Beck v. United Food & Commercial Workers Union Local 99*, 506 F.3d 874, 885 n. 5 (9th Cir.
4 2007) (whether two employees are similarly situated is ordinarily a question of fact)).

5 Albertsons' insistence that Ms. Johnson was not similarly situated to the male District
6 Managers in the Seattle Division because of her alleged poor performance issues is specious; they
7 were all District Managers. The similarly situated standard "is not an unyielding, inflexible
8 requirement that requires near one-to-one mapping between employees" because one can always
9 find distinctions in "performance histories or the nature of the alleged transgressions." *Earl v.*
10 *Nielsen Media Research, Inc.*, 658 F. 3d 1108, 1115 (9th Cir. 2011). Any alleged performance
11 deficiencies were caused by Albertson's discriminatory and/or retaliatory animus.
12

13 Ms. Johnson's performance from 2011 until mid-2017 met the accepted standards of the
14 company. Ennis dep., Ex. 30 (2011 Great Performer); Ennis decl., Ex. D (2014 Meets
15 Expectations); Johnson dep., Ex. 3 (Meets Expectations), Johnson decl., ¶ 24 (2016 Meets
16 Expectations); Schroeder dep., Ex. 60 (2016 second lowest percentage of sanitation violations in
17 the Division; 2016 out of stocks second lowest in Area 1). Ms. Johnson produces substantial
18 evidence that the reason her District was performing poorly in 2017 was due to retaliation from
19 Mr. Backus in the form of hyper-inflated sales projections that adversely affected all aspects of
20 District 24's performance metrics. Albertsons cannot first cause Ms. Johnson's District to perform
21 poorly then claim she is not similarly situated because her District is performing poorly as
22 compared with male managers not engaging in protected conduct. The reasoning is circular and
23 should be rejected.
24
25
26

1 Rob Backus treated Ms. Johnson with “absolute contempt.” Rader decl., ¶ 12, 13. Mr.
2 Backus ignored Ms. Johnson when touring stores with her management team—was rude and
3 dismissive toward her and rolled his eyes when she spoke. Pritchard decl., ¶ 16. This conduct had
4 a detrimental effect not only on Ms. Johnson, but infected her management team, as well—
5 damaging morale. *Id.* When touring Mr. Carlson’s store, Seattle Division senior leadership team
6 would physically turn their backs on Ms. Johnson when she spoke, were disrespectful, and so rude
7 it shocked the other management employees who participated in the tours. Carlson decl., ¶ 12, 13.
8 By comparison, male managers were treated with deference by Mr. Schroeder and Mr. Backus.
9 Carlson decl., ¶ 29.

11 **3) Albertsons replaced Ms. Johnson with a male District Manager.**

12 Requiring plaintiffs to establish they were “replaced” by a person outside the protected
13 class is particularly suspect where, as here, the replacement occurs after the defendant is put on
14 notice that the plaintiff may have a discrimination claim. *See Tsai v. AT&T Mobility, LLC*, 2009
15 WL 666939, at *2 (W.D. Wash. March 11, 2009) (holding that when the individual who was
16 promoted receives the challenged position only after the plaintiff has filed a discrimination charge,
17 the fact that both individuals are members of the same protected class does not rebut the otherwise
18 established inference of discrimination) (relying on *Diaz*, 752 F.2d at 1359–60). If the replacement
19 element was required in this circumstance, an employer could simply hire a member of the
20 protected class to avoid a discrimination claim. *See Diaz*, 752 F.2d at 1361 (finding plaintiff may
21 demonstrate inference of discrimination in whatever manner is appropriate under particular
22 circumstances, and noting “the burden of establishing a *prima facie* case is not designed to be
23 onerous”) (citations omitted).

1 Mr. Backus announced to all Seattle Division employees that Brett Podnar “replace[d] Kim
2 as the District Manager for District 24.” Schroeder dep., Ex. 58. However, even if Albertsons
3 could persuade the Court it replaced Ms. Johnson with a female, that does not absolve the company
4 from liability when it was on clear notice that Ms. Johnson may have a discrimination claim. From
5 at least January 2018, Albertsons was aware that they could face liability from a lawsuit brought
6 by Ms. Johnson. In a January 2018 email to the Chief Executive Officer Bob Miller, Ms. Johnson
7 clearly articulated that she and other female managers had been subjected to disparate treatment
8 by Rob Backus and other Seattle Division managers. Johnson dep., Ex. 17 (“I am writing to you .
9 . . requesting the immediate stoppage of biased treatment of women . . . in the Seattle Division.”).
10 The day after Ms. Johnson sent the letter to Mr. Miller, Finance Director Steve Mohrweis
11 announced to Mr. Glazer that Albertsons would have to increase the legal fees in the FY 2018
12 budget because of an anticipated lawsuit from Kim Johnson. Ennis dep., Ex. 32, p. 4.
13

14 **D. Ms. Johnson Produces Substantial Evidence of Retaliation to Meet her *Prima Facie***
15 **Obligation.**

16 “The purpose of Title VII's anti-retaliation provision is to bar employers from taking actions
17 which could have ‘a deleterious effect on the exercise of these rights by others.’” *Passantino v.*
18 *Johnson & Johnson*, 207 F.3d 599, 612 (9th Cir. 2000) (citing *Garcia v. Lawn*, 805 F.2d 1400,
19 1405 (9th Cir. 1986)). The *Passantino* Court held that Title VII encourages employees to report
20 actions that they reasonably believe are discriminatory, even if those actions are in fact lawful.
21 *Passantino*, 207 F.3d at 612 (citing *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994)). To succeed
22 on a retaliation claim, the plaintiff need not show “that the employment practice [she opposes]
23 actually [was] unlawful; opposition thereto is protected when it is based on a reasonable belief that
24 the employer has engaged in an unlawful employment practice.” *Little v. Windermere Relocation,*
25 *Inc.*, 301 F.3d 958, 969 (9th Cir. 2002). Here, Ms. Johnson reported what she reasonably believed
26

1 to be discriminatory actions taken by Rob Backus toward female managers in Albertsons' Seattle
2 Division. Johnson decl., ¶ 34.

3 **1) Ms. Johnson's complaints to Trevor Ennis and John Ortiz about demotions,**
4 **terminations, and harsh treatment of female managers constitute protected**
5 **conduct.**

6 Albertsons subjected Ms. Johnson to retaliation for complaining about gender
7 discrimination first to Seattle Division Human Resources Director Trevor Ennis and when Mr.
8 Ennis took no action, she complained to John Ortiz in the Boise corporate offices. The retaliatory
9 conduct included hyper-inflating the sale projections for her District to cause it to fail, placing her
10 on a performance improvement plan that was so onerous no District Manager could succeed, then
11 terminating her employment even though District 24's performance was steadily improving once
12 the hyper-inflated sales projections were lowered.

13 Albertsons does not appear to dispute that Ms. Johnson engaged in protected conduct. In
14 fact, Mr. Ortiz concedes that Ms. Johnson brought complaints to his attention. Ms. Morris
15 instructed Mr. Ortiz to "share" Ms. Johnson's concerns with Mr. Schroeder, which he did. Ortiz
16 dep., 60:14-25. Mr. Ortiz reported Ms. Johnson's complaints about Mr. Backus to Mr. Schroeder.
17 Ortiz dep., 63:7-25, 64:1-12. Ms. Johnson makes it clear that the complaints she reported to both
18 Mr. Ennis and to Mr. Ortiz were about demotions, terminations, and harsh treatment female
19 managers suffered at the hands of Rob Backus. Johnson decl., ¶ 30, 34.

20
21 It is undisputed that Seattle Division leader both knew about Ms. Johnson's complaints and
22 that Karl Schroeder, the person who made the decision to fire Ms. Johnson, was not happy about
23 her complaints. Mr. Schroeder told John Ortiz sometime after July 2017 that he believed Kim
24 Johnson was behind complaints about the Seattle Division leadership team that were being
25 conveyed to Boise Corporate management. Johnson decl., ¶¶ 35-36. Mr. Schroeder was skeptical
26

1 when Mr. Ortiz told him that others had also complained. Mr. Schroeder responded, “That damn
2 Kim Johnson.” Johnson decl., ¶ 37.

3 Ms. Johnson’s had no performance issues prior to engaging in protected activity. District
4 24 was struggling in 2016, as was the entire Division. Schroeder dep., Ex. 60. But Ms. Johnson’s
5 performance was rated Meets Expectations by Mr. Smith in July 2017. Mr. Backus put Division
6 results in a 2016 performance review demonstrating District 24 led the Division in sanitation and
7 scored well with the second least amount of out of stocks in Area 1 of the Division. *Id.*

8
9 **2) Ms. Johnson produces sufficient evidence to show a causal nexus between her
protected conduct and the termination of her employment.**

10 Causation may be established based on the timing of the relevant actions. “Specifically,
11 when adverse employment decisions are taken within a reasonable period of time after complaints
12 of discrimination have been made, retaliatory intent may be inferred.” *Passantino*, 207 F.3d at 612
13 citing *Yartzoff v. Thomas*, 809 F.2d 1371, 1375-76 (9th Cir. 1987) (finding causation based on
14 timing of retaliation); *Miller v. Fairchild Industries, Inc.*, 885 F.2d 498, 505 (9th Cir. 1989)
15 (holding that discharges 42 and 59 days after EEOC hearings were sufficient to establish *prima*
16 *facie* case of causation). Evidence based on timing can be sufficient to defeat summary judgment,
17 even if alternative reasons are proffered by the defendant. *Passantino*, 207 F.3d at 612.
18

19 Almost immediately upon learning of Ms. Johnson’s complaints about Rob Backus’s
20 disparate treatment of female managers, Mr. Backus imposed hyper-inflated sales projections on
21 District 24, which made it virtually impossible for District 24 to compete successfully with the
22 other Districts in the Division. Glazer decl., ¶¶ 13-19. Then with the inevitable decline of District
23 24, Mr. Schroeder put Ms. Johnson on a performance improvement plan.
24

25 **E. Albertsons’ Alleged Non-discriminatory Reason for Firing Ms. Johnson is Unworthy of**
26 **Belief and Merely Pretext for its Retaliatory Actions Because She Engaged in Protected**
Conduct.

1 As stated above, Plaintiff rejects the McDonnell Douglas shifting burden model, and as a
2 result does not have to prove pretext. *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1067 (9th
3 Cir. 2003). Nevertheless, evidence of pretext bolsters her claim of both retaliation and
4 discrimination.

5
6 Unlike the plaintiff in *Nilsson*, case relied upon by Albertsons, Ms. Johnson has specific,
7 substantial evidence that Albertsons' claim that the reason for her termination was poor
8 performance is unworthy of belief and/or pretext for the retaliation. In *Nilsson*, a failure to hire
9 case, the defendant asserted that it declined to hire the plaintiff as a police officer because she failed
10 the psychological evaluation. In response, the plaintiff offered the speculative testimony of a friend
11 on the force that she was a "legal risk" arising presumably out of an EEOC charge against a
12 previous employer. The Court held that rank speculation does not create a genuine issue of material
13 fact. *Nilsson v. City of Mesa*, 503 F.3d 947, 955 (9th Cir. 2007).

14
15 Ms. Johnson's work performance was deemed by several supervisors as either exceeds or
16 meets expectations until July 2017 when Seattle Division President learned from Susan Morris and
17 John Ortiz, Albertsons' corporate officers, that Ms. Johnson had complained that Mr. Backus had
18 engaged in gender discrimination. Johnson decl., ¶¶ 35-37; Ortiz dep., 63:7-25, 74:1-12.
19 Immediately thereafter, Mr. Backus directed the Finance Manager Jeff Glazer to push Ms.
20 Johnson's sales projections to an unjustified level that resulted in insufficient labor for the stores
21 with the cascading results that the conditions in the stores suffered. Glazer decl., ¶ 12; Ortiz dep.,
22 82:13-25, 83:1-2; Itaoka decl., ¶¶ 14-19; Itaoka dep., 129:5-8. Albertsons then put Ms. Johnson on
23 an onerous, unachievable performance improvement plan. Pritchard decl., ¶ 17. After Ms. Johnson
24 went on medical leave in December 2017, Albertsons posted her job as a vacancy and imposed
25 much more realistic sales projections for District 24. After she returned from leave, she
26

1 immediately began to make progress improving District 24. By March and April 2018, District 24
2 was showing marked improvement in nearly all metrics as compared with the other Districts in the
3 Division. Johnson decl., ¶ 58, Ex. C; Pritchard decl., ¶ 19. Yet, Albertsons fired Ms. Johnson
4 claiming her performance had not improved.

5 **F. Punitive Damages are available when there is Reckless Indifference to the Federally**
6 **Protected Rights Plaintiff.**

7 In *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), the Supreme Court
8 determined the standard for awarding punitive damages under Title VII. *Id.*, at 530. The Court
9 reaffirmed that Plaintiff must demonstrate that “the respondent engaged in a discriminatory
10 practice or discriminatory practices with malice or with reckless indifference to the federally
11 protected rights of an aggrieved individual.” *Id.* at 529-530. The Court rejected the argument that
12 the heightened standard for punitive damages requires that an employer's behavior be “egregious.”
13 *Id.* at 534-35. Although egregious conduct could be evidence of an intentional violation of the
14 law, it was not a necessary element. *Id.* at 535. The defendant is appropriately subject to punitive
15 damages if it acts “in the face of a perceived risk that its actions will violate federal law.” *Id.* at
16 536, 119 S.Ct. 2118.

17
18 Here, Ms. Johnson and other female managers were systematically demoted or terminated
19 upon the promotion of Rob Backus to the position of Senior Vice President. When she complained,
20 Mr. Backus commenced a perfidious scheme to oust Ms. Johnson by unrealistically inflating her
21 sales goals. Albertsons had no intention for Ms. Johnson to succeed in her PIP—the company
22 advertised for applicants for her job months before the PIP was scheduled to end. Johnson decl., ¶
23 58, Ex. C. These actions were taken in the perceived risk that they violated federal law. The
24 investigative report relied upon by Albertsons is inadmissible.
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IV. MOTION TO STRIKE

Plaintiff moves to strike any reference to the Dean Report as inadmissible hearsay. The Dean Report is replete with hearsay and double hearsay. Fed. R. Ev. 802. Moreover, the report is a legal conclusion masquerading as a factual statement. *Sullivan v. Dollar Tree Stores, Inc.*, 623 F. 3d 770, 777 (9th Cir. 2010). *See also Parker v. Arkansas Department of Correction*, 888 F.3d 396, 398 (Cir. 2018) (investigative report not admissible as a business record).

V. CONCLUSION

Ms. Johnson need only present evidence from which a jury might return a verdict in her favor. She has met that burden thereby creating a genuine issue of fact that requires a trial. *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1132 (9th Cir. 2003). For all the above reasons, Ms. Johnson respectfully requests this Court deny Defendant's motion.

DATED this 16th day of December 2019.

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CERTIFICATE OF SERVICE

I, Christine A. Thomas, certify and declare that I am now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to testify as a witness. I am a paralegal employed with the Law Office of Susan B. Mindenbergs. On December 16, 2019, I electronically filed the foregoing Response with the Clerk of the Court using the CM/ECF system which will transmit a notification of such filing to the following participants:

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The foregoing statement is made under the penalty of perjury under the laws of the United States of America and the State of Washington and is true and correct.

DATED this 16th day of December 2019.

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